



DECODING RESIDENTIAL STATUS UNDER FEMA

RAJESH P. SHAH
Chartered Accountant

INTRODUCTION

This article is the third part of a series on Income Tax and the Foreign Exchange Management Act (FEMA) issues related to NRIs. The first article focused on the provisions of the Income Tax Act, whereas the second one was on the applicability of the treaty on the definition of Residential Status. This article will focus on the definition of Residential status under FEMA regulation.

BACKGROUND

Many professionals get flooded with questions on cross-border transactions day in and day out from their resident and non-resident clients regarding the remittance and capital account transactions to be done by individuals and companies.

FEMA governs the financial aspects of a cross-border transaction. As far as the individuals are concerned, the fundamental issue is determining their residential status under FEMA.

In India, the residential status of an individual is determined under the Income-tax Act as well as under FEMA. People at large get confused in deciding the status under both statutes as the criteria for determination and their impact are pretty different.

We shall try to decode the definition of a RESIDENT under FEMA.

An Individual can be a resident under the Income-tax Act, and a non-resident under FEMA and vice versa. An individual can simultaneously be a non-resident or a resident under both Acts.

Also, under FEMA, a split residency is permitted, meaning a person can be a resident for part of the year and a non-resident for another part and vice versa. However, under the Income-tax Act, a person is either a resident or a non-resident for the entire financial year.

Thus, many permutations and combinations are possible. This leads to further complications in practical application.

The definition of "Resident" for an individual under FEMA is similar to that of erstwhile FERA, as both emphasise on a person's intention. However, FEMA has included the number of days stay in India (more than 182 days) in the preceding financial year as one of the criteria for determining the residential status.

DEFINITION

A person resident in India is defined u/s 2(v) of FEMA, as follow:

"person resident in India" means —

(i) a person residing in India for more than one hundred and eighty-two days during the course of the preceding financial year but does not include—

(A) a person who has gone out of India or who stays outside India, in either case—

(a) for or on taking up employment outside India, or

(b) for carrying on outside India a business or vocation outside India, or

(c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;

(B) a person who has come to or stays in India, in either case, otherwise than—

(a) for or on taking up employment in India, or

(b) for carrying on in India a business or vocation in India, or

(c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;

(ii) any person or body corporate registered or incorporated in India,

(iii) an office, branch or agency in India owned or controlled by a person resident outside India;

(iv) an office, branch or agency outside India owned or controlled by a person resident in India;

Whereas,

(w) "person resident outside India" means a person who is not resident in India;

From the above definition, it is clear that section 2(v) defines an individual to be resident in India if he resides in India for more than one hundred and eighty-two days during the course of the preceding financial year, except where he has gone out of India or who stays outside India, (a) for or on taking up employment outside India, or (b) for carrying on outside India a business or vocation outside India, or (c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period. Thus, a person falling under the above exceptions will not be considered a person resident in India even though his stay in India exceeded 182 days in the preceding financial year. This can give rise to a split residency. Consider an individual who leaves India for employment on 1st November, 2023. He can be considered a non-resident under FEMA from that date and would be a resident from 1st April, 2023 till 31st October, 2023. The exceptions will be operative as he is leaving for employment. Hence, although his stay in India during FY 2022-2023 exceeded 183 days, he would be regarded as non-resident w.e.f. 1st November, 2023.

Similarly, in case of a person resident outside India who is coming back to India to take up employment or for carrying on business or vocation in India or for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period, such person would be regarded as a person resident in India from the day he comes to India even if his stay in the preceding financial year in India was less than 183 days.

There is another school of thought, and according to which a person can become non-resident from the date he leaves India for employment, business / vocation or an uncertain period; however, to determine the residential status of an individual returning to India, one has to look at the physical stay of that person in the preceding financial year along with the intentions, such as employment, business / vocation or stay for an uncertain period. This view is applicable in the case of the purchase of immovable property in India as per the Press Release by

the Government of India dated 1st February, 2009. As per the said Press Release, to be considered as a person resident in India, **a person has not only to satisfy the condition of the period of stay in India (being more than 182 days during the preceding financial year) but also his purpose of stay as well as the type of Indian visa granted to him should indicate the intention to stay in India for an uncertain period.**

In this regard, to be eligible, the intention to stay has to be unambiguously established with supporting documentation, including a visa.

Section 7(1) of the Limited Liability Partnership Act, 2008 (LLP Act) stipulates that every LLP should have two designated partners who are individuals, and at least one of them shall be a resident in India. The Explanation further provides that the term "resident in India" means a person who has stayed in India for a period of not less than one hundred and eighty-two days during the immediately preceding year. Thus, an individual must satisfy the 182-day stay criteria to become a designated partner in an LLP.

Determination of the Residential Status of an individual based on his stay in India in the preceding FY may pose serious challenges, as one has to wait for the entire year to become a resident of India that is too subject to stay in the preceding FY of 183 days or more. Therefore, except for buying properties or becoming a designated partner in an LLP, the earlier view seems more practical and workable, i.e., an individual becomes a resident of India from the date he arrives for employment, business/ vocation, or stay for an uncertain period.

This view is strengthened by the provisions of Para 7 of Schedule 1 of FEMA Notification 5 (R)/2016 - RB – dated 1st April, 2016, which provides that NRE accounts should be re-designated as resident accounts or the funds held in these accounts may be transferred to the RFC accounts **immediately upon the return of the account holder to India for taking up employment or for carrying on business or vocation or for any other purpose indicating intention to stay in India for an uncertain period.**

From the above, it is clear that significant focus is being put on the intention of the person going abroad or returning to India.

Thus, we find that determining the residential status of a returning Indian is challenging. One needs to interpret the



same in the context in which it is to be determined.

It is interesting to note that section 2(w) of the FEMA defines “person resident outside India” as a person who is not resident in India. Thus, it does not define the term “non-resident”, but for all practical purposes, the term “person resident outside India” is equated to “non-resident of India.” Similarly, the term “Non-Resident of India” (NRI) is not defined in FEMA, but various notifications / Master Directions define the term. For example, Para 2(vi) of the FEMA Notification 5 (R)/2016 - RB – dated 1st April, 2016, as well as defines ‘Non-Resident Indian (NRI)’ as a **person** resident outside India who is a citizen of India. Rule 2(aj) of the FEMA Non-Debt Instruments Rules, 2019¹ defines ‘Non-Resident Indian (NRI)’ as an **individual** resident outside India who is a citizen of India.

ILLUSTRATION

Let’s understand the concept of the Residential Status of an Individual under FEMA with the help of some examples:

1. Mr Raj leaves India for employment on 26th May, 2021. His stay during the preceding Financial Year, i.e., 2020–2021, was 365 days.

Will he be a non-resident as per FEMA?

Answer: Residence for an individual under FEMA has been defined u/s 2(v)(i).

An individual is considered an Indian resident if he has been in India in the preceding financial year for more than 182 days.

To determine the residential status of Mr. Raj as of 26th May, 2021, we need to check if in the preceding year, i.e. 2020–21, his stay in India was more than 182 days.

As in preceding year Mr. Raj was in India for more than 182 days; he is a resident of India as on 26th May, 2021 as per FEMA.

However, on 26th May, 2021, Mr Raj went outside India for employment and therefore fell under one of the exclusions in the definition of “person resident in India” hence, he is a Non-resident of India from 26th May, 2021.

2. If Mr Raj returns to India on 31st July, 2023 for

employment, what would be his residential status under FEMA for FY 2023–24? (You may assume his stay in India during the FY 2022–2023 period to be less than 182 days).

Answer: To determine the residential status as per FEMA law for the financial year 2023–24, we need to check if his stay in India in the preceding year i.e. 2022–23 was more than 182 days. As in the preceding year, Mr. Raj was in India for less than 183 days. He is a Non-resident as per FEMA till July 2023, after which he shall become a Resident if he intends to stay in India for employment.

However, if Mr Raj intends to buy a property in India, he must complete a stay in India of 183 days or more in the preceding FY. Assuming Mr. Raj’s stay in India during the FY 2023–2024 exceeds 182 days, he can buy a property in the FY 2024–2025.

From the above, it is clear that one needs to apply the test of stay in India as well as the intention of a person depending upon the context for which one determines the residential status.

RESIDENTIAL STATUS OF A STUDENT GOING ABROAD FOR STUDIES

RBI vide its Press Release 2003-2004/710. Circular No. 45 dated 8th December, 2003² has clarified that “taking into account the definition of resident under FEMA and the intention of the student to stay abroad for an uncertain period though not for permanent settlement, it has been decided to treat them henceforth as non-residents from the FEMA angle.” The Circular further clarifies that “as non-residents, students will, in any case, be eligible for receiving remittances from India, as follows: (i) up to USD 100,000 from close relatives from India on self-declaration towards maintenance, which could include remittances towards their studies also, (ii) up to USD 1 million out of sale proceeds / balances in their account maintained with an AD in India, (iii) all other facilities available for NRIs under FEMA, (iv) educational and other loans which were availed (as residents in India) by students would be allowed to continue.”

While taking up studies or further advanced courses, students may have to take up jobs or seek scholarships to

¹ Also refer Para 2.18 of the Master Direction – Foreign Investment in India RBI/FED/2017-18/60 FED Master Direction No.11/2017-18 dated 4th January, 2018, updated up to 17th March, 2022

² <https://www.rbi.org.in/commonman/Upload/English/PressRelease/PDFs/40570.pdf> and <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=2763>



supplement income to meet their financial requirements abroad. As they have to earn and learn, their stay for educational purposes gets prolonged than what is intended while leaving India. Thus, the above clarification and NRI status will help students take up jobs and undertake various financial transactions as non-residents without violating FEMA provisions.

A few more examples of residential status are as follows:

Sr. No.	Purpose	Status	Reasons
1	A person Leaves India to take up employment for the first time.	A person Resident Outside India	Since he has left India for employment, he has become non-resident from the day he leaves India.
2	The student leaves for Australia to undertake a Master's degree course for three years.	A person Resident Outside India	As per RBI Circular No. 45 dated 8 th December, 2003,
3	A person visits India as a tourist.	A person Resident Outside India	Since he is on a visit for a fixed or specific period.
4	A person goes to Brisbane to participate and represent India. His stay was extended for eight months.	A person Resident in India	Since he has gone for a fixed period and his coming back is confirmed.
5	A person has gone to the UK. She will return to India after the maternity case of her daughter.	A person Resident in India	Since the period of stay is definite and not uncertain.
6	A person has taken up American citizenship even though his wife and children are in India. He travels to India to meet his family and is in India for more than 250 days. However, he is employed in the USA and intends to be outside India.	A person Resident Outside India	Since he has no intention to stay in India for the uncertain period and is employed outside India.
7	A person is serving on board a ship flying the Indian National Flag and has not set up any residence, business, or profession outside India.	Person Resident in India	A ship with the Indian National Flag is considered a territory of India. He cannot be considered a person who proceeded outside India to take up employment and set up a business or profession.

Sr. No.	Purpose	Status	Reasons
8	A person employed with an Indian company undertakes export promotion tours to Singapore. He was in Singapore for approximately 201 days.	A person Resident in India	Since he is employed in India and has not gone to Singapore to take up employment or carry on business for an uncertain period, a visit abroad while exercising employment in India or a business visit cannot make a person non-resident. Also, export promotion tours typically are for a fixed duration; therefore, on all counts, that person will be regarded as a Resident of India.
9	A person leaves India for the US as he received a Green Card but has no employment or business, but he intends to settle or stay there for an uncertain period.	A person Resident Outside India	The receipt of a Green Card signifies the intention to stay outside India. The said intention is fortified with the person moving to such a country. Therefore, he will be regarded as a non-resident from the day he leaves India.
10	A person who is a foreign citizen of non-Indian origin sets up a proprietary concern in India on 1 st June, 2019, to carry on business with the intention of settling in India.	A person Resident in India	Since a person is coming to India to set up Business or Vocation, he will be considered a resident in India.

OVERSEAS CITIZEN OF INDIA (OCI)

Another essential aspect to understand is OCI.

The Constitution of India does not allow holding dual citizenship.

However, to overcome the difficulty for various Indians settled abroad who have taken foreign citizenship (foreign passports), on 2nd December, 2005, the government launched the "Overseas Citizens of India" scheme. Registration as an OCI provides the registrant with a few benefits. An illustrative list is stated below:

- A multiple entry / multi-purpose life-long visa for visiting India.



- OCI may be granted Indian citizenship after five years from the date of registration, provided they stay in India for one year before making the application and are subject to renouncing the citizenship of another country. Employment is allowed to an OCI in all areas except mountaineering, missionary and research work and other work requiring PAP / RAP (PAP - Protected Area Permit, RAP - Restricted Area Permit).

A foreign national is eligible for registration as an OCI holder if one falls under any of the below criteria:

- Who was eligible to become a citizen of India on 26th January, 1950** or
- Was a citizen of India on or at any time after 26th January, 1950 or
- Belonged to a territory that became part of India after 15th August, 1947
- Person of Indian Origin card holders are deemed to be OCI.

Children and grandchildren, including minor children of the above-referred persons, are also eligible for registration as an OCI, provided their country of citizenship allows the same in some form or other under local laws and are eligible for registration as an OCI.

However, if the applicant had ever been a citizen of Pakistan or Bangladesh, he would not be eligible for registration as an OCI.

- A spouse of foreign origin of a citizen of India or spouse of foreign origin of an OCI card holder registered and whose marriage has been registered and subsisted for a continuous period of not less than two years immediately preceding the application's presentation would be eligible to obtain registration as an OCI.

For eligibility for registration as OCI, such spouse shall be subjected to prior security clearance from a competent authority in India.

**Any person who, or whose parents or grandparents were born in India as defined in the Government of India Act, 1935 (as originally enacted), and who was ordinarily residing in any country outside India was eligible to become a citizen of India on 26th January, 1950. An OCI card holder is eligible to visit India without obtaining

a VISA.

PERSON OF INDIAN ORIGIN (PIO)

A PIO means a foreign citizen (except a national of Pakistan, Afghanistan, Bangladesh, China, Iran, Bhutan, Sri Lanka, and Nepal):

- who at any time held an Indian passport; Or
- who or either of their parents / grandparents/great grandparents were born and permanently resident in India as defined in the Government of India Act, 1935 and other territories that became part of India thereafter, provided neither was at any time a citizen of any of the countries above (as referred above); Or
- who is a spouse of a citizen of India or a PIO.

A TRANSITION FROM PIO CARD TO OCI CARD

Earlier, the "PIO Card Scheme" was in place. The PIO card scheme has been withdrawn vide Gazette Notification No. 25024/9/2014 F. I dated 9th January, 2015. Further, vide Gazette Notification No 26011/01/2014IC. I dated 9th January, 2015; all existing PIO card holders are deemed OCI card holders. Therefore, no separate authentication of the existing PIO card as an OCI card is necessary. Henceforth, applicants may only apply for an OCI Card, as the PIO Card scheme no longer exists. Current PIO cardholders may apply for OCI cards instead of their PIO cards.

CONCLUSION

The residential status under FEMA is often misconstrued due to the insertion of a number of days' conditions, similar to the definition under the Income-tax Act. However, it is essential to note that the impact of residential status under FEMA is from the regulatory perspective, not the revenue perspective. Some situations lead to different residential statuses as explained in the article above; however, from the perspective of FEMA, the person's intention is of utmost importance. It is also noteworthy that intentions need to be justifiable / verifiable from the documentary evidence such as type of visa, employment letter, hiring of an apartment, etc., and it should not be merely a thought by a person that he intends to stay in or out of the country. If the intention, coupled with the number of days of stay, is examined correctly, the residential status can be obtained for a particular person for a given period. As stated earlier, applying the criteria of stay vs. intentions will be relevant in the context in which one seeks to apply the provisions. ■